92-186

No. A-860

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

CATHERINE BARBER AND AS EXECUTRIX,
PETITIONER,

v.

SOMERVILLE HOSPITAL, INC., AND ASSIGNS;
DR. ALBERT H. FINE;
INTERNAL MEDICINE SERVICES, INC.,
AND ASSIGNS;
VISITING NURSE, INC., AND ASSIGNS,
RESPONDENTS.

**Brief of Respondent, Visiting Nurse, Inc.,
In Opposition to Petition for Writ of Certiorari.**

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Questions Presented.[1]

(1) Whether the Massachusetts Appeals Court erred when it held that a Massachusetts Superior Court Judge did not abuse his discretion under the Massachusetts Rules of Civil Procedure when he allowed the motion filed by Visiting Nurse, Inc. ("Visiting Nurse")[2] to remove any default entered against it?

(2) Whether the Massachusetts Appeals Court erred when it held that the petitioner had not submitted sufficient evidence to a tribunal convened pursuant to G.L. c. 231, 60B, a Massachusetts statute which requires a tribunal to screen medical malpractice claims?

(3) Whether the Massachusetts Appeals Court erred when it held that the petitioner's claim for medical records from Visiting Nurse was moot where Visiting Nurse had agreed to produce the records?

[1] The Questions Presented are limited to those issues which were addressed by the Massachusetts Appeals Court and which involved Visiting Nurse. The petitioner waived all other issues because she did not argue them adequately in the brief she filed with the Massachusetts Appeals Court. *See* Mass. R. App. P. 16(a)(4); Appendix C, p. 80.

[2] Visiting Nurse, Inc. has changed its name to Visiting Nurse Association of Eastern Massachusetts, Inc. It has no parent corporation, and has no subsidiaries (other than wholly-owned subsidiaries).

Statutes Involved.

General Laws c. 231, § 60B is reproduced in the Petition for Writ of Certiorari at pp. 24a-27a. General Laws c. 112, § 12CC is also pertinent, and it provides that:

> A health care provider who maintains records for a patient treated or examined by such provider shall permit inspection of such records by such patient or an authorized representative of the patient, and upon request and payment of a reasonable fee shall make a copy of such patients' record available to such patient or such representative. For purposes of this section, "health care provider" shall mean a person or entity providing medical care or services, including but not limited to, physicians and surgeons, therapists, dentists, nurses, optometrists, chiropractors, psychologists, podiatrists.

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**Brief of Respondent, Visiting Nurse, Inc.,
In Opposition to Petition for Writ of Certiorari.**

Statement of the Case.

On August 4, 1989, the petitioner filed suit against several defendants, including Visiting Nurse. The complaint alleged that all defendants failed to provide the proper standard of care to the petitioner's mother, who died on August 6, 1983. It further alleged that Visiting Nurse had refused to provide the petitioner with copies of her mother's medical records. On November 24, 1989, the petitioner requested that a default judgment enter against Visiting Nurse.

On November 24, 1989, Visiting Nurse filed a *pro se* Motion to Extend Time Within Which To Answer Or In The Alternative To Set Aside Default and Answer Late, together with a Motion to Dismiss. Ultimately, no action as taken on these motions because the court ruled that Visiting Nurse had to obtain a lawyer. While Visiting Nurse's motions were pending, the petitioner had filed a Motion for Assessment of Damages against Visiting Nurse and Visiting Nurse had filed a *pro se* opposition to that motion.

The law firm of Parker, Coulter, Daley & White was then retained to represent Visiting Nurse. On December 19, 1989, Visiting Nurse filed an answer to the plaintiff's Amended Complaint along with an Opposition to Plaintiff's Request for Judgment by Default and Motion for Assessment of Damages. The opposition asserted that counsel for Visiting Nurse was not retained until the week of Monday, December 11, 1989. Furthermore, the opposition asserted that, prior to obtaining that counsel, Visiting Nurse had attempted to discharge its obligations in good faith by filing a motion to dismiss. Visiting Nurse's answer to the complaint was filed with the opposition to Plaintiff's Request for Judgment by Default and Motion for Assessment of Damages. On December 29, 1989, Visiting Nurse filed a second Motion to Dismiss which asserted that the statute of limitations barred the plaintiff's claims, but the court never acted on that motion.

Under Massachusetts law, claims for medical malpractice are submitted to a tribunal which considers whether the evidence submitted by the plaintiff "if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." G.L. c. 231, § 60B. If the tribunal rules against the plaintiff, the plaintiff may pursue her claim in court only if she posts a bond. *Id*. In this case, a medical malpractice tribunal issued findings in favor of Somerville Hospital, Visiting Nurse, and Dr. Fine in January, 1990.

On February 23, 1990, Visiting Nurse filed a Motion to Remove Default. Visiting Nurse's motion asserted that counsel for Visiting Nurse was not retained until the week of Monday, December 11, 1989. Furthermore, in the interim, Visiting Nurse had attempted to discharge its obligations in good faith by filing a Motion to Dismiss. When counsel had been retained in December, 1989 to represent Visiting Nurse, she had called the clerk's office at Norfolk Superior Court and was told that a default had *not* entered against Visiting Nurse. Counsel also obtained a docket sheet which did not show that a default had been entered on the docket. On February 1, 1990, Visiting Nurse's counsel called the clerk's office again, because of the petitioner's repeated assertions that Visiting Nurse had been defaulted. At that point, the clerk's office informed her that Visiting Nurse had been defaulted, but that the default was not entered on the docket because of an error by the clerk's office. On March 5, 1990, a Superior Court judge allowed the Motion to Remove Default.

When the petitioner failed to post a bond pursuant to G.L. c. 231, § 60B, Visiting Nurse, Somerville Hospital and Dr. Fine all moved to dismiss and that motion was granted. On appeal, the Massachusetts Appeals Court affirmed the judgment. With respect to Visiting Nurse, Inc., the Massachusetts Appeals Court ruled that: (1) there was no error in removing the default entered against Visiting Nurse, Inc.; (2) the request for records claim was moot because Visiting Nurse had agreed to produce the records; (3) the medical malpractice tribunal statute, G.L. c. 231, § 60B, applied to the petitioner's claims; and (4) the offer of proof that the petitioner filed with the medical malpractice tribunal did not adequately support her claims. (See Appendix C to Petition for Writ of Certiorari.) The Massachusetts Supreme Judicial Court denied the petitioner's Application for Further Appellate Review. (*See* Appendix B to Petition for Writ of Certiorari.)

Summary of Argument.

The Petition for Certiorari should be denied because the decision of the Massachusetts Appeals Court is based entirely on state law grounds. The Massachusetts Appeals Court did not consider any federal questions.

Furthermore, the Massachusetts Appeals Court properly applied state law precedents in resolving the petitioner's appeal. The Massachusetts Appeals Court properly concluded that a Massachusetts Superior Court Judge did not abuse his discretion in removing any default against Visiting Nurse. In fact, several factors supported the Superior Court judge's ruling: (1) before Visiting Nurse retained counsel, it attempted in good faith to comply with its obligations; (2) once Visiting Nurse retained counsel, counsel acted promptly and properly to remove the default; (3) the petitioner did not establish that she was prejudiced by the delay; and (4) Visiting Nurse's defenses to the petitioner's claims had some merit.

The Massachusetts Appeals Court also correctly held that the Superior Court had properly dismissed any treatment-related claims against Visiting Nurse. A medical malpractice tribunal convened pursuant to state law properly rejected the petitioner's medical claims because she did not have any expert testimony to support them.

Finally, the Massachusetts Appeals Court properly concluded that the petitioner's medical records claim was moot, where Visiting Nurse had agreed to provide the records to her.

Argument.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURTS RELIED EXCLUSIVELY ON STATE LAW GROUNDS WHEN THEY REJECTED THE PETITIONER'S CLAIMS.

The decision of the Massachusetts Appeals Court was based entirely on state law and did not consider any federal questions. Indeed, in ruling in favor of Visiting Nurse, the Massachusetts Appeals Court simply applied established precedent construing Massachusetts law. *See* Petition for Writ of Certiorari, Appendix C. In this circumstance, the Petition for Writ of Certiorari should be denied. In any event, the Massachusetts Appeals Court's application of state law was correct. *See* pp. 5-9, *infra*.

I. THE PETITIONER WAS NOT ENTITLED TO A DEFAULT JUDGMENT AGAINST VISITING NURSE.

Properly applying Massachusetts precedent concerning Massachusetts state court rules, the Massachusetts Appeals Court correctly concluded that the petitioner was not entitled to a default judgment against Visiting Nurse. Under Massachusetts law, the decision to remove a default is addressed to a trial judge's discretion. *See Cicchese* v. *Tape Time Corp.*, 28 Mass. App. Ct. 72, 74, 546 N.E.2d 384, 385 (1989). In this case, the Superior Court judge clearly did not abuse his discretion in removing any default against Visiting Nurse. Indeed, several factors supported the judge's ruling.

First, Visiting Nurse acted in good faith before retaining its current counsel. Although the plaintiff filed this action on August 4, 1989, Visiting Nurse was not served until October 25, 1989. Prior to retaining counsel in December, 1989 Visiting

Nurse attempted in good faith to discharge its obligations by filing a motion to dismiss, and a motion to remove default and enlarge time.

Second, Visiting Nurse's counsel acted promptly and properly in connection with the purported default. Upon being retained to defend Visiting Nurse, counsel called the clerk's office and was informed that Visiting Nurse had not been defaulted. Moreover, the docket sheet did not refer to any default. Visiting Nurse's counsel promptly filed an answer on December 19, 1989. When counsel learned of the purported default in February, 1990, she promptly filed a Motion to Remove the Default on February 23, 1990.

Third, the plaintiff made no showing that she was prejudiced by the ten-day delay in receiving Visiting Nurse's Motion to Dismiss.

Fourth, the motions to dismiss filed by Visiting Nurse show that its defenses had some merit. "The standard in this regard does not require a showing of certainty of success. All that is necessary is an indication that the claim is one worthy of judicial investigation because raising a material question of law meriting discussion and decision, or a real controversy as to essential facts arising from conflicting or doubtful evidence." *Berube* v. *McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 433, 388 N.E.2d 309, 313 (1979) (citation omitted). In this case, the motion to dismiss showed that: (1) from the face of the complaint, it was clear that any malpractice claim against Visiting Nurse was barred by the statute of limitations and (2) the petitioner's complaint failed to show how Visiting Nurse's failure to provide medical records to the petitioner caused any harm. Thus, the record before the judge who allowed the motion to remove the default showed that Visiting Nurse had defenses which were worthy of judicial investigation.

For all of these reasons, it is clear that the Superior Court judge did not abuse his discretion in removing any default against Visiting Nurse.

II. The Superior Court Judge Properly Dismissed Any Treatment-Related Claims Against Visiting Nurse.

General Laws c. 231, § 60B establishes a screening procedure and a bonding requirement which are intended to "discourage frivolous medical malpractice claims, thus reducing the losses to the insurance companies and enhancing the likelihood of the future availability of coverage." *Paro* v. *Longwood Hospital*, 373 Mass. 645, 651, 364 N.E.2d 985, 989 (1977) (footnote omitted). It is settled that claims that nurses provided improper care are subject to the tribunal statute. *See Little* v. *Rosenthal*, 376 Mass. 573, 382 N.E.2d 1037 (1978) (claim against nursing home); *Delicata* v. *Bourlesses*, 9 Mass. App. Ct. 713, 404 N.E.2d 667 (1980) (claim against nurse).

Under the statutory procedure, a tribunal evaluates the plaintiff's offer of proof to determine "if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." G.L. c. 231, § 60B. Once the plaintiff submits her offer of proof, the tribunal applies a directed verdict test and determines whether a nurse-patient relationship is shown, whether there is evidence that the nurse's performance did not conform to good medical practice, and whether damage resulted therefrom. *See Delicata*, 9 Mass. App. Ct. at 717-718, 404 N.E.2d at 670. To establish these elements, the plaintiff must present evidence; mere allegations are not sufficient. *Gugino* v. *Harvard Community Health Plan*, 380 Mass. 464, 467-468, 403 N.E.2d 1166, 1168 (1980).

In this case, the petitioner's complaint broadly alleged that "[a]ll defendants failed to perform their duties in general and provide the standard of care expected when a patient is is [*sic*] taken to a hospital rather than treated at home . . ." and that

they "failed to adequately and properly treat the plaintiff's decedent according to their respective professional standards." From this broad language, it appeared that the petitioner might be alleging that Visiting Nurse provided improper medical care so that a tribunal was needed to evaluate that claim.

The brief which the petitioner filed in the Massachusetts Appeals Court made it clear, however, that the petitioner named Visiting Nurse as a defendant only to obtain medical records. *See* Petition for Writ of Certiorari, p. 37a ("Visiting Nurse, Inc. and assigns was included in the Complaint because they refused the plaintiff her mother's records. . . ."). She made no contention in her appellate brief that her offer of proof provided sufficient evidence that Visiting Nurse had improperly treated the decedent and thereby caused her death. In any event, the plaintiff's offer of proof did not include any expert testimony to support any medical claim against Visiting Nurse. *See Delicata*, 9 Mass. App. Ct. at 719, 404 N.E.2d at 671 (expert testimony usually necessary to support a medical malpractice claim).

It is apparent that the petitioner abandoned any treatment-related claim against Visiting Nurse. In any event, she failed to submit sufficient evidence to the tribunal to support such a claim and it is therefore clear that the Massachusetts Appeals Court correctly held that the Superior Court judge did not err in dismissing any treatment-related claim against Visiting Nurse.

III. The Appeals Court Properly Concluded That The Petitioner's Medical Records Claim Was Moot.

While the petitioner's appeal was pending, the Massachusetts Legislature enacted a statute which requires a health care provider to allow a patient's representative to inspect and copy

medical records. *See* G.L. c. 112, § 12CC. Pursuant to this statute, Visiting Nurse agreed to provide a copy of the records to the petitioner. Consequently, applying Massachusetts law, the Appeals Court properly concluded that the medical records claim was moot.[3] *See Eastern Mobile Homes, Inc.* v. *Curtis*, 9 Mass. App. Ct. 930, 930-931, 404 N.E.2d 699, 670 (1980).

Conclusion.

For all of the foregoing reasons, the respondent, Visiting Nurse, Inc., respectfully submits that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

By its attorneys,

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[3] It is true that the petitioner has not actually obtained the records because she refused to accept them at the office of Visiting Nurse's counsel. Nevertheless, by tendering the records, Visiting Nurse has complied with its obligations.